

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

DAVID ROBERT THOMPSON,  
Petitioner,  
v.  
BRIAN WILLIAMS,  
Respondents.

Case No. 2:17-cv-02932-RFB-GWF

## ORDER

Before the court are the first amended petition for writ of habeas corpus (ECF No. 7), petitioner's motion for leave to file second amended petition (ECF No. 13), respondents' opposition (ECF No. 15), and petitioner's reply (ECF No. 16). For the reasons stated below, the court grants the motion.

Petitioner has filed a first amended petition and sought leave to file a second amended petition because petitioner is concerned about the timeliness any grounds for relief. Petitioner calculated that the one-year period of limitation expired on July 28, 2018. He filed the first amended petition on that date in the hopes that any grounds raised in a second amended petition would relate back to the first amended petition. See *Mayle v. Felix*, 545 U.S. 644, 650 (2005).

Respondents first argue that petitioner did not attach a proposed second amended petition to the motion. Local Rule LR 15-1(a) states that a proposed amended pleading must be submitted with the motion for leave to amend unless otherwise permitted by the court. When the court

1 appoints counsel to represent habeas corpus petitioners, as a matter of course it gives counsel  
2 leave to file an amended petition without first submitting a proposed amended petition. The only  
3 difference here is that counsel is trying to file a petition before the one-year deadline to minimize  
4 the probability that grounds for relief would not relate back to a timely petition. The court sees  
5 no reason to depart from its usual practice in habeas corpus cases.

6         Respondents next argue that without a proposed amended petition, they cannot determine  
7 whether the amended grounds would be subject to the defenses of failure to exhaust, procedural  
8 default, or untimeliness. However, when the court gives appointed counsel leave to file an  
9 amended petition in a situation where expiration of the period of limitation is not looming, the  
10 court does not require the petitioner to demonstrate a lack of futility in the amended petition.  
11 Rather, the court allows the respondents to move to dismiss based upon those defenses. The court  
12 sees no difference between the normal course of counseled habeas corpus proceedings and what  
13 petitioner is asking in this case, other than, again, trying to minimize the probability that grounds  
14 for relief are untimely.

15         The court has been presented with situations in which it has denied leave to amend  
16 because the petitioner has not submitted a proposed amended petition. However, that issue often  
17 occurs when the petition has been fully briefed on the merits, and then the petitioner, often pro se,  
18 asks for leave to amend to add new grounds. In those situations, the court has required the  
19 petitioner to demonstrate that amendment would not be futile, often because the proposed  
20 amended grounds would be untimely. By that stage of the proceedings, the parties and the court  
21 had spent much time litigating the case, and the court did not want to re-start the briefing process  
22 for what would be an exercise in futility. That has not occurred in this case.

23         Petitioner also has filed a motion for leave to file exhibits under seal (ECF No. 11). The  
24 exhibits in question are sealed in a separate criminal case. The court agrees that they should be  
25 sealed in this case, too.

26         IT THEREFORE IS ORDERED that petitioner's motion for leave to file second amended  
27 petition (ECF No. 13) is **GRANTED**. Petitioner shall have sixty (60) days from the date of entry  
28 of this order to file and serve a second amended petition for a writ of habeas corpus. Neither the

1 foregoing deadline nor any extension thereof signifies or will signify any implied finding of a  
2 basis for tolling during the time period established. Petitioner at all times remains responsible for  
3 calculating the running of the federal limitation period under 28 U.S.C. § 2244(d)(1) and timely  
4 asserting claims.

5 IT FURTHER IS ORDERED that petitioner's motion for leave to file exhibits under seal  
6 (ECF No. 11) is **GRANTED**.

7 DATED: August 28, 2018.

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9 ~~RICHARD E. POULWARE, II~~  
10 United States District Judge

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